

§ 1016.104 Decisionmaking authority.

Unless otherwise ordered by the Board in a particular proceeding, each application for an award under this part shall be assigned for decision to the official or decisionmaking body that entered the decision in the adversary adjudication. That official or decisionmaking body is referred to in this part as the “adjudicative officer.”

[46 FR 61660, Dec. 18, 1981, as amended at 54 FR 26379, June 23, 1989]

§ 1016.105 Eligibility of applicants.

(a) To be eligible for an award of attorney fees and other expenses under the Act, the applicant must be a party to the adversary adjudication for which it seeks an award, it must have stood in an adversary relationship to the position taken by agency counsel, and it must have prevailed on one or more of the issues raised by agency counsel. The term “party” is defined in 5 U.S.C. 504(b)(1)(B). The applicant must show that it meets all conditions of eligibility set out in this subpart and in Subpart B.

(b) The types of eligible applicants are as follows:

(1) An individual whose net worth did not exceed \$2 million at the time the adversary adjudication was initiated;

(2) Any owner of an unincorporated business, or any partnership, corporation, association, unit of local government, or organization whose net worth does not exceed \$7 million and which had no more than 500 employees at the time the adversary adjudication was initiated;

(3) Any organization described in section 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C. 501(c)(3)) exempt from taxation under section 501(a) of such Code, or a cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)), may be a party regardless of the net worth of such organization or cooperative association.

(c) For the purpose of eligibility, the net worth and number of employees of an applicant shall be determined as of the date the proceeding was initiated.

(d) The employees of an applicant include all persons who regularly perform services for remuneration for the

applicant, under the applicant’s direction and control. Part-time employees shall be included on a proportional basis. Independent contractors under lease to motor carriers are not employees of the carriers under these rules. Also, agents for motor common carriers of household goods are not employees of their respective principal carriers.

(e) The net worth and number of employees of the applicant and all of its affiliates shall be aggregated to determine eligibility. Any individual, corporation or other entity that directly or indirectly controls or owns a majority of the voting shares or other interest of the applicant or any corporation or other entity of which the applicant directly or indirectly owns or controls a majority of the voting shares or other interest, will be considered an affiliate for purposes of this part, unless the adjudicative officer determines that such treatment would be unjust and contrary to the purposes of the Act in light of the actual relationship between the affiliated entities. In addition, the adjudicative officer may determine that financial relationships of the applicant other than those described in this paragraph constitute special circumstances that would make an award unjust.

(f) An applicant that participates in a proceeding primarily on behalf of one or more other persons or entities that would be ineligible is not itself eligible for an award.

[46 FR 61660, Dec. 18, 1981, as amended at 54 FR 26379, June 23, 1989]

§ 1016.106 Standards for awards.

(a) A prevailing applicant may receive an award for fees and expenses incurred in connection with a proceeding, or in a significant and discrete substantive portion of the proceeding, unless the position of the agency over which the applicant has prevailed was substantially justified. Whether or not the position of the agency was substantially justified shall be determined on the basis of the administrative record made in the adversary adjudication for which fees and other expenses are sought. The burden of proof that an